SUPREME COURT, U.S.
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No. 10-922

In the Supreme Court of the United States

JOHN M. DIAMOND,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Armed Forces

BRIEF FOR THE NATIONAL INSTITUTE OF MILITARY JUSTICE AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

The petition for a writ of certiorari notes the following Question Presented:

> Are statements to police investigating a crime *per se* nontestimonial for purposes of the Confrontation Clause if made by a person alleged to be a co-conspirator of the accused?

Amicus National Institute of Military Justice believes that the following additional questions are presented:

> May certiorari be granted where the Court of Appeals for the Armed Forces grants discretionary review and remands for further proceedings and, following those proceedings, denies further discretionary review?

> Is review under 28 U.S.C. § 1259 restricted to the particular issue(s) as to which the Court of Appeals for the Armed Forces granted review or does it extend to all issues in the case?

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INTEREST OF THE AMICUS CURIAE*

The National Institute of Military Justice ("NIMJ") is a District of Columbia nonprofit corporation organized in 1991 to advance the fair administration of military justice and foster improved public understanding of the military justice system. Its advisory board includes law professors, private practitioners, and other experts in the field, none of whom are on active duty in the military, but most of whom have served as military lawyers. NIMJ directors and advisors have practiced before the United States Court of Appeals for the Armed Forces ("CAAF"), and have served on its Rules Advisory Committee as well as the statutory Committee on Military Justice.

NIMJ appears regularly as an *amicus curiae* before CAAF and other federal courts. It was an *amicus* in support of the government in *Clinton v. Goldsmith*, 526 U.S. 529 (1999), and in support of the petitioners in *Rasul v. Bush*, 542 U.S. 466 (2004).

NIMJ is actively involved in public education on military law through online media (its website, www.wcl.american.edu/nimj and its blog, www.nimjblog.org), and hard-copy publications such as the *Guide to the Rules of Practice and Procedure*

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* Amicus gave notice to all parties at least 10 days before this brief's due date. Counsel for all parties have consented to the filing of this brief; copies of their letters have been filed with the Clerk. Counsel for NIMJ have authored this brief in whole, and no person or entity other than the *amicus* has made a monetary contribution to the preparation or submission of this brief. NIMJ takes no position on whether petitioner should prevail on the Confrontation Clause issue.

for the United States Court of Appeals for the Armed Forces (13th ed. 2010).

SUMMARY OF ARGUMENT

The petition is properly filed because CAAF initially granted review and relief. Based on the plain meaning of 28 U.S.C. § 1259, this Court's review extends to all questions petitioner seeks to raise, not merely those as to which CAAF granted review. CAAF's effort, by rule, to arrogate to itself a power to block this Court's review of cases in which CAAF had previously granted review is improper. CAAF is the only appellate court in the country that (a) asks a petitioner for discretionary review what issues he or she wishes to raise in *this* Court, and (b) affirmatively maintains that it may deny review in order to assure that *this* Court will not be able to consider a case or an issue in a case that CAAF wishes to insulate from review on certiorari.

ARGUMENT

I

The petition for a writ of certiorari is within the Court's jurisdiction

Article I, § 8, clause 14, of the Constitution gives Congress power to "make Rules for the Government and Regulation of the land and naval Forces." Under this authority, in 1950 Congress passed the Uniform Code of Military Justice ("UCMJ") for military personnel in all branches of the armed forces.[1] Coupled with the Rules for Courts-Martial and Military Rules of Evidence promulgated by the President

[1] 10 U.S.C. §§ 801–946.

in the *Manual for Courts-Martial*,[2] the UCMJ provides a comprehensive framework for the administration of military justice. The UCMJ establishes several layers of appellate review,[3] including (following enactment of the Military Justice Act of 1983)[4] review here on writ of certiorari for some actions by CAAF.[5]

As is true of all Article I courts, the jurisdiction of the appellate military courts is confined to what Congress specifies by statute.[6] Cases with sentences that include confinement for one year or longer or a punitive discharge are automatically reviewed by the service branch's court of criminal appeals. The Army Court of Criminal Appeals automatically reviewed petitioner's case because he was sentenced to be confined for life without parole and a dishonorable discharge.[7]

Unlike the service courts' jurisdiction, in noncapital cases such as this, CAAF's review is discretionary.[8] That court granted review of petitioner's case and summarily remanded for "additional appel-

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[2] *See* UCMJ Art. 36, 10 U.S.C. § 836.

[3] UCMJ Arts. 66-67, 10 U.S.C. §§ 866-67. *See generally Weiss v. United States*, 510 U.S. 163, 166-69 (1994).

[4] Pub. L. 98-209, 310(a)(1), 97 Stat. 1405.

[5] UCMJ Art. 67a, 10 U.S.C. § 867a; 28 U.S.C. § 1259.

[6] *See Clinton v. Goldsmith*, 526 U.S. 529, 533-34 (1999).

[7] *See* UCMJ Art. 66(b)(1), 10 U.S.C. § 866(b)(1); *United States v. Diamond*, 65 M.J. 876 (Army Ct. Crim. App. 2007) (Pet. App. B).

[8] UCMJ Art. 67(a)(3), 10 U.S.C. § 67(a)(3).

late inquiry" by the Army Court.[9] Following the service court's decision on remand,[10] petitioner again sought review by CAAF, but this time his petition was denied.[11]

The petition for certiorari is within this Court's jurisdiction. Even though CAAF denied review the second time around, it had earlier granted review. This Court has jurisdiction over court-martial cases where CAAF has granted either review of or relief in the case.[12] A remand constitutes "relief" for this purpose.[13] Neither Article 67a(a) of the UCMJ[14] nor § 1259 of the Judicial Code limits this Court's jurisdiction to cases in which CAAF granted review the last time the case came to that court. Rather, the plain language indicates that CAAF need only have granted review or relief at some point in the appellate process.[15]

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[9] *United States v. Diamond*, 67 M.J. 247 (C.A.A.F. 2009) (mem.). The order granting review noted a single issue: "WHETHER THE NAMED CO-CONSPIRATOR, MICHELLE THEER, PAID APPELLANT'S CIVILIAN DEFENSE COUNSEL RETAINER AND, IF SO, WHETHER THIS CONFLICT OF INTEREST WAS DISCLOSED TO THE COURT." (Pet. App. A.)

[10] *United States v. Diamond*, 2010 CCA LEXIS 66 (Army Ct. Crim. App. May 26, 2010) (unpub. op.)(Pet. App. C.)

[11] *United States v. Diamond*, 2010 CAAF LEXIS 903 (C.A.A.F. Oct. 19, 2010) (Pet. App. E.)

[12] 28 U.S.C. §§ 1259(3)-(4).

[13] *United States v. Denedo*, 129 S. Ct. 2213, 2219-20 (2009).

[14] 10 U.S.C. § 867a(a).

[15] *See* 28 U.S.C. §§ 1259(3)-(4).

A case that has once been the subject of a grant of review or relief by CAAF remains the same "case" for purposes of certiorari jurisdiction when it returns to CAAF following a remand to one of the service courts.[16] In other words, having once opened the door to this Court's jurisdiction by granting review, it would be contrary to the two governing statutes to treat CAAF as having yet another opportunity to bar the way by denying review, as happened here. It would also compel litigants to seek review here of any CAAF remand out of an abundance of caution, even though they might have substantially prevailed by gaining a remand that could lead to a victory on the merits. Such an interpretation, even if it had a basis in the text of the statute, would have little to recommend it as a matter of sound judicial administration.

II

This Court has jurisdiction over "cases" in which CAAF has granted review or relief, and is not limited to the particular "issue(s)" as to which CAAF has granted review

Petitioner's Question Presented is not the issue CAAF noted when it granted review in 2009, although it is an issue on which Petitioner sought review. However, that does not deprive this Court of jurisdiction.

The Solicitor General, perhaps influenced by CAAF's practice of issuing orders that purport to grant review on particular issues, has repeatedly in-

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[16] *See* C.A.A.F.R. 21(b)(5)(G).

sisted that review by petition for a writ of certiorari for court-martial cases is available only with respect to issues on which CAAF has granted review.[17]

That view is mistaken. Plainly, CAAF can specify in the grant of review fewer than all of the issues raised by an appellant. This is clear from the third sentence of Article 67(c).[18] The same sentence provides that CAAF has a duty to act only with respect to those issues. However, under the initial clause of Article 67(a), the entire record in the case must be reviewed, and under the plain language of Article 67(a)(3), it is the "case" that is reviewed. CAAF orders that identify particular issues are properly understood as marking the metes and bounds of what the court *must* act on (not the larger universe of what it *may* act on), and as a practical matter merely as limiting the briefing to particular issues – a routine power that *any* appellate court enjoys, including this one. To view an order granting review in any other light would pit the issue-oriented third sentence of Article 67(c) against the case-oriented terms of Article 67(a).

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[17] *See, e.g.*, Brief for the Respondent, *Stevenson v. United States*, No. 07-1397, at 7-8, *available at* http://www.usdoj.gov/osg/briefs/2008/0responses/2007-1397.resp.pdf; Brief for the Respondent, *McKeel v. United States*, No. 06-58, at 5-6, *available at* http://www.usdoj.gov/osg/briefs/2006/0responses/2006-0058.resp.pdf. Given this background, it is reasonable to anticipate that the Solicitor General will make this argument in opposing certiorari. This brief is NIMJ's only opportunity to present its views on this important and recurring issue.

[18] 10 U.S.C. § 867(c).

The statutory text and, if more were needed, the legislative history, confirms our position. When Congress expanded the certiorari jurisdiction to include cases arising under the UCMJ, it did so with respect to "cases" in which CAAF's predecessor – the Court of Military Appeals – had granted review. This is in contrast to the approach taken earlier in the legislative process of permitting certiorari review only of "issues" as to which that court had granted review.[19]

Whether certiorari may be granted with respect to an issue CAAF does not list when granting review is an "unresolved question."[20] This is a recurring matter. When CAAF grants review, its order typically lists fewer than all of the issues presented by the appellant in what is called, in CAAF practice, the "supplement" to the petition for a grant of review.[21] Indeed, correctly or not, it occasionally grants review in a case in which the appellant has cited no issues at all,[22] or its order granting review

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[19] *See generally* Eugene R. Fidell, *Review of Decisions of the United States Court of Appeals for the Armed Forces by the Supreme Court of the United States*, in *Evolving Military Justice* 150-51 & nn.12-15 (Eugene R. Fidell & Dwight H. Sullivan eds. 2002).

[20] *See* Eugene Gressman, Kenneth S. Geller, Stephen M. Shapiro, Timothy S. Bishop & Edward A. Hartnett, *Supreme Court Practice* 128 n.103 (9th ed. 2007).

[21] *See* C.A.A.F.R. 21.

[22] *E.g., United States v. Dalrymple*, 14 U.S.C.M.A. 307, 308-09, 34 C.M.R. 87, 88-89 (C.M.A. 1963); *see generally* Eugene R. Fidell, *Guide to the Rules of Practice and Procedure for the United States Court of Appeals for the Armed Forces* 156 (13th ed. 2010) (collecting cases).

may list one or more issues of its own fashioning (so-called "specified" issues)[23] or it may rephrase an issue, just as this Court does on occasion.

Even if the Court were otherwise disposed to deny the petition at bar in light of the considerations set forth in Rule 10, it will be important to the military justice system – even more than the proper disposition of petitioner's Question Presented – to make clear, in keeping with both the text and legislative history of Article 67a and section 1259, that a certiorari petition will lie as to any issue in a case in which CAAF has granted review, regardless of whether the order granting review mentions the particular issue(s) with respect to which certiorari is later sought.

The Court indicated in *Denedo*[24] that the statute granting jurisdiction over court-martial cases should not be read parsimoniously. At issue there was a contention by a Navy enlisted man that the government's petition lay outside the Court's jurisdiction. Here the shoe is on the other foot, but the construction of the statute must remain constant. It is disturbing enough that Congress has given the military personnel who defend the Nation narrower access to this Court than the untrammeled access enjoyed by all other petitioners for certiorari, including those

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[23] C.A.A.F.R. 5, 21(d). CAAF uses the term "specified" in a narrower sense than does Article 67(c). Under that provision, any issue on which it grants review is "specified," whereas in CAAF parlance, a "specified" issue is one entirely framed by the court and not "assigned" by the appellant. CAAF distinguishes between the two in orders granting review.

[24] 129 S. Ct. at 2219.

convicted by military commissions.[25] There is emphatically no reason to make that discrepancy all the more pronounced by construing the grant of certiorari jurisdiction in court-martial cases more narrowly than the statutory text or legislative history warrant.

III

CAAF cannot limit access to this Court by changing its own rules

As if the Solicitor General's cramped reading were not enough, CAAF itself further confounded the system Congress put in place when it extended the certiorari jurisdiction to courts-martial. The UCMJ requires "good cause" for a grant of review by CAAF.[26] At the time petitioner obtained a grant of review in 2009, CAAF's Rule 21(b)(5)(G) unmistakably indicated that the court would grant review of cases it had earlier remanded for further review or action:

> ... The supplement shall contain:
>
> * * *
>
> (5) A direct and concise argument showing why there is good cause to grant the petition, demonstrating with particularity why the errors assigned are materially prejudicial to

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[25] *Compare* 28 U.S.C. § 1254 *with* 28 U.S.C. § 1259; *see* 10 U.S.C. § 867a(a); Military Commissions Act of 2009, 28 U.S.C. § 950g(d); *see also The Equal Justice for Our Military Act of 2009. Hearing on H.R. 569 Before the Subcomm. on Courts and Competition Policy of the H. Comm. on the Judiciary*, 111th Cong. (2009) (Statement of Dwight H. Sullivan).

[26] UCMJ Art. 67(a)(3), 10 U.S.C. § 867(a)(3).

> the substantive rights of the appellant. Where applicable, the supplement to the petition shall also indicate whether the court below has:
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> * * *
>
> (G) taken inadequate corrective action after remand by the Court subsequent to grant of an earlier petition in the same case and that appellant wishes to seek review from the Supreme Court of the United States...[27]

This rule was promulgated in 1990.[28] CAAF changed it in 2010, while petitioner's case was still on review, to require appellants for the first time to specify "the issue or issues on which certiorari review would be sought, whether related to the remand or to the original decision by this court."[29] CAAF's notice of the proposed change explained:

> The recent practice of the Court has been to grant petitions for grant of review in cases that have been previously remanded ... and are returned to the Court on a second petition. The grant of review is intended to protect the right to seek certiorari review at the

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[27] C.A.A.F.R. 21(b)(5)(G) (pre-2010 version).

[28] *In re Changes of Rules*, 31 M.J. 465 (C.A.A.F. July 16, 1990). *See generally Rules Guide*, *supra* note 22, at 151-52, 158-59.

[29] C.A.A.F.R. 21(b)(5)(G) (2010 revision) ("(G) taken inadequate corrective action after remand by the Court subsequent to grant of an earlier petition in the same case and that appellant wishes to seek review in the Supreme Court of the United States specifying the issue or issues on which certiorari review would be sought, whether related to the remand or to the original decision by this Court").

> Supreme Court, and may be accompanied by a summary order of affirmance. The proposed change to the Rule ... will make it clear that there is no right to further review in this Court in all remanded cases, and also provide a more orderly process for identifying the issues that are being preserved for review on petition for certiorari. The Court can then decide whether to grant and affirm or take other action it deems appropriate.[30]

This comment properly acknowledges CAAF's history of preserving appellants' opportunity to petition for certiorari in the few cases in which it has granted discretionary review.[31] It goes on to imply that CAAF had been wrong for 20 years to preserve the right to petition, even though this Court's review is discretionary, and only a small percentage of courts-martial are reviewed by CAAF. The import of the rule change is that litigants whose cases that are granted discretionary review by CAAF and remanded to a service court for further action may lose the option of petitioning this Court for a writ of cer-

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[30] Notices, 75 Fed. Reg. 8683 (2010).

[31] The explanation shows the reasonableness of petitioner's reliance on past CAAF practice in not seeking certiorari with respect to CAAF's 2009 grant-and-remand. Between that grant of review and the 2010 denial, CAAF abandoned not only its policy of automatically granting post-remand petitions but also its practice of automatically granting petitions for review in cases where, as here, the approved sentence includes confinement for 30 or more years. *See* Michelle Lindo McCluer, *Training Highlights New CAAF Rules*, Sept. 8, 2010, *available at* http://www.nimjblog.org/2010/09/training-highlights-new-caaf-rules.html. This aggravates the unfairness of the 2010 denial of review.

tiorari. To say there is "no right to further review" after a case is remanded is to create a conflict with section 1259, which grants the Court certiorari jurisdiction over, *inter alia*, all cases in which CAAF had granted relief.[32] As *Denedo* held, a CAAF remand qualifies as "granting relief" for purposes of this Court's jurisdiction over court-martial appeals.

The 2010 rule change requires appellants who seek to show good cause for a post-remand grant of CAAF review to anticipate what they might ask of *this* Court in a certiorari petition. This effectively requires military appellants alone among the universe of criminal appellants to front-load possible certiorari-petition Questions Presented, and worse yet, to subject them to screening by a lower court.

Every defendant in a criminal case in a civilian court can apply for review in this Court by first seeking direct review in the system in which he or she was tried and then, not having prevailed in a lower appellate court, seek review here. Only men and women in uniform – those who have served the country but have been convicted of a crime – cannot automatically seek review in this Court. CAAF unquestionably has the right under the system Congress created, for better or worse, to serve as a "gatekeeper" of sorts for this Court.

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[32] Under 28 U.S.C. § 1259, the Court may review CAAF's decisions if (1) the sentence extends to death; (2) the Judge Advocate General certifies the case to CAAF; (3) CAAF has granted review upon a petition of the accused showing good cause; and in (4) "Cases, other than those described in paragraphs (1), (2), and (3) of this subsection, in which the Court of Appeals for the Armed Forces granted relief."

But there are limits to CAAF's gatekeeper role. One is that it cannot claim that a defendant who has obtained relief in the form of a remand has not qualified to seek review here. Another is that only *this* Court, not CAAF, can require litigants to state the issues on which they may seek a writ of certiorari. CAAF's new "good cause" rule thus exceeds that court's power: whether a case merits review on certiorari is for *this* Court to decide, not some lower court. Indeed, CAAF's own rules direct that they not be construed either to extend or to limit its jurisdiction.[33] A fortiori, those rules cannot be construed to limit *this* Court's jurisdiction. It is ultra vires for CAAF, in determining whether there is good cause for the exercise of its own discretionary jurisdiction, to weigh in the balance – and therefore judge the viability of – the issues a litigant says, under the compulsion of a CAAF rule, that he or she wishes to present *here*.

NIMJ strongly objected to CAAF's 2010 rule change that imposed this requirement.[34] CAAF impermissibly helped itself to a second bite at the apple in terms of barring or keeping open the path to potential review in this Court. What is more, the change made no special provision for cases that had previously been remanded and were still in the appellate pipeline. It took effect on July 1, 2010, which,

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[33] C.A.A.F.R. 4(c).

[34] Letter from Eugene R. Fidell, Pres., NIMJ, to Fed. Dkt. Mgt. Sys. Off. (Mar. 22, 2010), *available at* http://www.wcl.american.edu/nimj/documents/CAAFRuleComments2010.pdf?rd=1. CAAF's order adopting the revised rule made no reference to NIMJ's objections. *In re Change of Rules*, 69 M.J. 159 (C.A.A.F. 2010).

coming more than a month after the Army Court's decision on remand in petitioner's case, meant it was too late for him to seek certiorari with respect to CAAF's 2009 decision. After-the-fact switches are inherently unfair.[35] The 2010 rule change is no exception.[36] The 2010 rule change was thus highly improper, both substantively and procedurally.

It was also unwise, a matter to which this Court should turn a blind eye. The amended rule virtually requires prudent counsel to seek certiorari immediately with respect to any CAAF remand in order to preserve the client's opportunity for review here. The change raised the specter – confirmed by this case – that CAAF could deny review of a case following a remand and thereby attempt to block review here on an issue that was before CAAF prior to remand. There is a place for Supreme Court review of interlocutory appeals in courts-martial, as *Solorio v. United States*[37] demonstrates, but CAAF erred in altering its rules in a way that imposes on counsel a professional obligation to file, thereby adding, perhaps needlessly, to this Court's work. It is bad enough that Congress has given this Court a gate-

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[35] *Hanratty v. F.A.A.*, 780 F.2d 33, 35 (Fed. Cir. 1985).

[36] CAAF never explained why its new requirement for early identification of the issues to be presented in a certiorari petition in order to secure a grant of review below should be limited to cases previously remanded. Consistency suggests that if, contrary to our view, "certworthiness" were a proper factor in CAAF's good-cause decision making under Article 67(a)(3), it should be taken into account in first-time petitions for grant of review as well, these being far more numerous than post-remand petitions.

[37] 549 U.S. 1025 (2006).

keeper function; there is no reason to make matters worse by requiring litigants to overcome that hurdle twice.

The interest in judicial economy is not a valid basis for CAAF's boardinghouse reach in unilaterally expanding its gatekeeping function. In recent Terms, the court has received 650-1000 petitions for grant of review. Many of these cite no errors and are merely pro forma submissions in what are called "merits" cases. The court decides only about one case per month per judge on full opinion.[38] Whatever the precise workload, it does not justify creating an additional, unique obstacle for this one defined class of litigants – a class that should, if anything, be favored in an era in which so many demands are placed on our military personnel – to navigate on the road to this Court. Even if CAAF's settled practice of automatically granting review following remands did (improbably) tax its resources, and even if no time was spent on cases in which neither the accused nor appellate defense counsel even frame an issue, access to this Court is no place (to use Judge Learned Hand's phrase) to ration justice.[39]

There is also the question of the equality of arms between the prosecution and the defense in the mili-

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[38] The statistics may be found on CAAF's website, www.armfor.uscourts.gov, and in the Annual Report of the Code Committee on Military Justice for the Period October 1, 2008 to September 30, 2009, *available at* http://www.armfor.uscourts.gov/Annual.htm.

[39] Learned Hand, Address Before the Legal Aid Society of New York, Feb. 16, 1951, quoted in *Hardy v. United States*, 375 U.S. 277, 293-94 (1964) (Goldberg, J., concurring).

tary system. Under the UCMJ, the accused has the right to have CAAF review his conviction, and therefore to have the Supreme Court review his certiorari petition, only if the punishment extends to the death penalty; in all other cases, CAAF has discretion as to whether to grant review.[40] The government, on the other hand, may appeal to CAAF and to the Supreme Court in any case reviewed by a service court.

Furthermore, CAAF is obligated to hear all cases certified to it by the Judge Advocates General of the respective services, and the Supreme Court has discretionary review of CAAF's decisions in such cases. In the words of then-ABA President H. Thomas Wells, "[h]istorically, certification by the Judge Advocate General ... essentially grants the government a virtual guaranteed right of appeal to the CAAF in any case it chooses, while the accused may only petition for discretionary review."[41]

Given the appellate advantages the UCMJ thus already affords the government, CAAF's 2010 rule change has little to recommend it from the standpoint of providing "Equal Justice Under Law."

CONCLUSION

For the foregoing reasons, the petition is within the Court's jurisdiction. The Court should use the opportunity presented by this case to make clear,

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[40] UCMJ Art. 67, 10 U.S.C. § 867.

[41] *The Equal Justice for Our Military Act of 2009: Hearing on H.R. 569 Before the Subcomm. on Courts and Competition Policy of the H. Comm. on the Judiciary*, 111th Cong. (2009) (Statement of H. Thomas Wells, Jr., President, the American Bar Association) at 3.

even if only in an order denying certiorari, that (1) a certiorari petition may be filed on all issues presented in a case in which CAAF has granted review or relief, regardless of whether that court identified them when it granted review, and (2) revised Rule 21(b)(5)(G) is unlawful to the extent that it purports to allow CAAF to consider what issues a litigant might include in a certiorari petition in deciding whether there is good cause for CAAF review under Article 67(a)(3).

Respectfully submitted.

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